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No. 94-444

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA, ex rel.
E. BENJAMIN NELSON, Governor,

Petitioner,

v.

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION; and US ECOLOGY, INC., a California Corporation,

Respondents.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Central Interstate Low-Level Radioactive Waste Commission and US Ecology, Inc.,[1] respectfully request that the Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

[1] The parent corporation of US Ecology, Inc. is American Ecology, Inc. See, Supreme Court Rule 29.1.

STATEMENT OF THE CASE

Petitioner's statement of the case fails to set out the facts underlying this action. As the district court's opinion discloses, there are no material facts in dispute in this case. The following facts were determined by the district court to be uncontroverted; indeed, the petitioner conceded virtually all of them to be true. *See* Pet. App. at 18-19.

In late 1987, Nebraska's then-Governor, Kay A. Orr, proposed conditions relating to the siting and construction of a proposed low-level radioactive waste disposal facility for adoption by the Central Interstate Low-Level Radioactive Waste Commission (hereinafter "Commission"). Such conditions, including one relating to "community consent," were adopted by the Commission, subject to certain qualifications. Pet. App. at 15. At the time she proposed the "community consent" concept, and thereafter, Governor Orr explicitly rejected the idea that "community consent" should be determined by some form of local vote. Pet. App. at 16.

In 1988, shortly after the Commission's adoption of Governor Orr's "community consent condition," the Nebraska Legislature enacted a statute which explained or defined the "community consent" concept. That statute did not attempt to impose any specific method for determining the existence of "community consent" on either the Commission, or the project developer, US Ecology, Inc. Pet. App. at 15-16. Thereafter, the Nebraska Legislature has repeatedly and consistently refused to enact any law requiring or authorizing a vote of any kind as a

measure of the "community consent" concept. Pet. App. at 16.

As the district court expressly found, "throughout 1988 and 1989, US Ecology made extensive efforts to solicit community support for the proposed facility in a variety of communities in Nebraska." Pet. App. at 16. In response to US Ecology's efforts, the community of Butte, located in Boyd County, Nebraska, invited US Ecology to investigate the geology in the surrounding area to determine if the disposal facility could be located there. The Village Board of Butte, Nebraska, has consistently expressed support for the proposed facility, with the most recent official expression of support by the community of Butte, Nebraska, occurring at about the time this lawsuit was filed. Pet. App. at 16.

The site near Butte, Nebraska, was selected as the final site for construction of the proposed regional disposal facility in late 1989, and Nebraska was officially notified of that site selection by both the Commission and US Ecology in February, 1990. Pet. App. at 17. The formal notification by the Commission was authored by Norman W. Thorson, who at the time was Nebraska's representative on the Commission and was serving as the Commission's chairman. Pet. App. at 25-26. Thorson's letter notifying Nebraska that the selection of the Butte site was final was sent to Nebraska's Governor, each member of Nebraska's Legislature, each member of the Commission, and the Commission's Executive Director. Pet App. at 23-24. Shortly after the notification letter from Thorson, US Ecology filed a written notice with the Clerk of the Nebraska Legislature indicating that its selection of the Butte site was final. Pet. App. at 24. On July 27, 1990, US

Ecology filed a license application with the Nebraska Department of Environmental Quality seeking a license to operate a regional disposal facility at the Butte, Nebraska, site. Pet. App. at 17.

Both before and after submission of the license application by US Ecology, Nebraska's Governor Orr made and authorized various public statements indicating that the community consent factor had been specifically met as to the Butte, Nebraska, site. Pet. App. at 17.

Nebraska's current Governor, E. Benjamin Nelson, was elected to office in November, 1990; he was sworn into office in early January, 1991. On about December 7, 1990, then-Governor-elect Nelson was notified, in an extensive legal memorandum signed by the Executive Director and General Counsel of the Commission and by the Commission's outside legal counsel, that "The Compact Commission has concluded and firmly believes that all legal requirements relative to community consent have been met or exceeded. The form of consent made relevant to the site selection process is one fixed at a point in time which has now passed." Pet. App. at 17-18.

Notwithstanding Governor Orr's rejection of the idea that community consent should be determined by some form of local vote, the complaint filed by the petitioner in this case alleged that community consent is lacking because a poll conducted by the Boyd County Local Monitoring Committee, in December, 1992, found among the populace of Boyd County general disagreement with the location of the site. The evidence before the district court indicated that the Monitoring Committee's "straw poll" was authorized, or at least encouraged, by Governor

Nelson. However, as the district court expressly found, "There is no legal authority under Nebraska law for a Governor to order, implement, or agree to any form of legally binding vote of the kind allegedly conducted by the Boyd County Local Monitoring Committee alleged in paragraphs 22 and 23 of the amended complaint." Pet. App. at 16.

Between March, 1990, and the date of the district court's summary judgment decision, the Commission spent or authorized the expenditure of more than $33,000,000 in furtherance of the facility proposed for the Butte, Nebraska, site; of that amount, more than $8,000,000 was paid to the State of Nebraska, mostly for license application review purposes. Pet. App. at 17.

This lawsuit was filed on January 13, 1993. That date was nearly three years after Nebraska's Governor and Legislature were specifically notified that the selection of the Butte site was final; approximately two and a half years after US Ecology submitted a license application for the Butte site; and more than two years after Governor Nelson was expressly notified by the Commission that the Commission had concluded that all legal requirements relative to community consent had been met or exceeded. Pet. App. at 14-17.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The record and decisions of the courts below do not fairly raise the questions presented in the petition.

Petitioner presents two questions. The first asks whether the Commission can make a decision which commences the running of a statute of limitation without taking a vote; the second asks whether federal courts can "apply" case law arising under the federal Administrative Procedure Act in deciding this case when that statute is claimed to be "inconsistent" with the language of the Compact. Neither question is fairly raised by the opinions of the courts below, and neither flows from the record. The Court should therefore deny the petition.

As the district court recognized, neither the Compact itself nor the resolution relating to "community consent" adopted by the Commission required the Commission or US Ecology to make any particular findings related to "community consent" or to take any kind of formal vote. Pet. App. at 28.

> Once the Compact Commission and US Ecology had made their "final site selection," this obviously involved making all the decisions necessary to reach such a conclusion. Without a legal requirement that the Compact Commission specifically determine the existence of "community consent," there is no basis for challenging the lack of a specific finding.

Id.

Further, the final site selection was not made in a vacuum; Nebraska's Governor had opined that her "community consent condition" was satisfied as to the Butte site. As the district court put it:

> Moreover, once Governor Kay Orr, the originator of the concept of "community consent," specifically found that community consent existed, there was nothing for the Commission to decide. (Ex.3 16, 18.) There simply was no reason for the Commission to think that it was required to make elaborate findings on "community consent" when the person who demanded utilization of the concept in the first place was satisfied that the condition had been met.

Pet. App. at 28. The Eighth Circuit agreed with the district court's analysis. Pet. App. at 6-8.

Petitioner implies that the Commission made some sort of "tacit, back room agreement," and further suggests that both the State of Nebraska and the public generally lacked sufficient information to protect their rights. Petition at 8. The record simply does not support these dire accusations. Dr. Thorson was Nebraska's representative on the Commission, appointed to that position by Governor Orr. The letter he sent to each member of the Nebraska Legislature and Governor Orr provided clear notice of the final selection of the Butte site. Art. II, Sec. (i) of the Compact defines "notification" as "transmittal of written notice to the Governor, presiding officer of each legislative body, and any other persons designated by the party state's commission member to receive such notice." Pet. App. at 40. Even after the change in administrations, Governor Nelson was specifically reminded that

the Commission believed that the "community consent condition" created by his predecessor had been met; that "extremely detailed, specific and blunt" communication occurred more than two years before this litigation was initiated by Governor Nelson. Pet. App. at 24.

The question petitioner presents regarding the lower courts' citation of cases decided under the APA is similarly specious. Neither the district court nor the Eighth Circuit "applied" the APA to the exclusion of the Compact's language. Rather, both courts did what courts commonly do: They reviewed helpful authorities from an analogous area of the law in analyzing the claims presented to them for decision. Nothing in that approach deprived Nebraska of any legal rights; more to the point, nothing in that approach departs so far from common adjudicative methodology to warrant this Court's attention.

Petitioner asserts no split in the circuits on any question it presents because there is none. Supreme Court Rule 10.1(a). Petitioner does not claim that the Court of Appeals has decided a federal question in a way that conflicts with any applicable decision of this Court. Supreme Court Rule 10.1(c). This case presents no important question of federal law which has not been, but should be, settled by this Court. *Id.* Simply put, there are no "special and important reasons" warranting exercise of the Court's certiorari jurisdiction. The petition should be denied.

2. The Court should deny the petition because resolution of the questions presented therein in favor of the petitioner would only result in a finding that the case is not ripe for adjudication.

The thrust of petitioner's contentions is that absent an affirmative vote of the Commission that the "community consent condition" has been met as to the Butte site, there has been no final decision of the Commission, and the 60-day statute of limitations set out in the Compact has not begun to run. However, as the Eighth Circuit observed, "The State conceded during oral argument that if we were to agree that the Commission has not made a final decision, the case would not be ripe for decision." Pet. App. at 6, n. 5. It thus appears that a decision wholly favorable to petitioner would result only in the absence of a justiciable case or controversy.

This Court does not exercise its certiorari jurisdiction to render advisory opinions or to adjudicate hypothetical disputes which may or may not arise in the future. Yet, complete adoption of petitioner's position would have precisely those results. The petition should therefore be denied.

3. The equitable relief sought by petitioner below is barred by the defenses of estoppel and laches.

Although the Court of Appeals found it unnecessary to reach the issue, Pet. App. at 9, the district court held, alternatively, that petitioner is not entitled to the equitable relief it sought (a permanent injunction barring construction of the disposal facility) because such relief is barred by the doctrines of estoppel and laches. Pet. App.

at 30-35. If the Court were to grant certiorari in this case, it would need to resolve these issues as well.

Petitioner's only mention of these alternative holdings is as follows:

> Finally, although the Eighth Circuit did not address the issue, petitioner contends that the doctrines of laches and equitable estoppel do not apply against the State of Nebraska in the type of action brought in this case. There has been no detrimental reliance by the other party states which would warrant the use of these defenses against the State.

Petition at 15.

Petitioner's assertion of "no detrimental reliance" is flatly contradicted by the undisputed facts found by the district court. As the court explained:

> Three things are particularly pertinent. Governor Orr, who originated the concept of "community consent," has frequently and consistently stated that "community consent" has been satisfied. (Ex. 3 ¶¶ 16, 18 & attach. A.) Governor Nelson, by virtue of his receipt of exhibit 15, was specifically notified that the Compact Commission and US Ecology believed that "community consent" had been achieved and there was no further legal requirement to be satisfied with regard to community consent. Lastly, after the notice of final site selection was delivered to the Nebraska legislature, the Compact Commission spent 33 million dollars, including 8 million dollars paid to the State of Nebraska, in order to pursue licensing of its final site selection in

> Boyd County, Nebraska. Under the circumstances, it would be grossly inequitable to permit the State of Nebraska to challenge the actions of the Compact Commission and the developer at this late date.

Pet. App. at 30-31.

The record in this case conclusively demonstrates that Nebraska's change in position on the subject of "community consent" is an attempt to renege on obligations for political purposes. The record shows that Governor Nelson campaigned on a platform which included a virtual promise to keep a low-level radioactive waste disposal facility from being built in Nebraska, the State's obligations under the Compact notwithstanding. Given the expenditure of more than $33,000,000 by the Commission prior to this change in positions, including over $8,000,000 paid directly to Nebraska for expenses involved in the license review process, this case presents a classic factual basis for application of the equitable doctrines of estoppel and laches. The alternative holding of the district court presents yet one more reason for denial of the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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